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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 313

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL RICE MILLING COMPANY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review, in part, the decision of the United States Court of Appeals for the Fifth Circuit issued on June 21, 1950 (R. 153-160), which set aside the Board's order dismissing an unfair labor practice complaint, and remanded the case to the Board for further proceedings not inconsistent with the court's opinion.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 153-160) is reported at 183 F. 2d 21. The findings of fact,

conclusions of law, and the order of the National Labor Relations Board (R. 100-103, 104-146) are reported at 84 NLRB 360.

JURISDICTION

The decree of the Court of Appeals was entered on June 21, 1950. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Pursuant to its demand for recognition as bargaining agent a labor organization engaged in picketing in the vicinity of the employer's place of business.[1] The picketing and related activities at the employer's premises induced employees of a neutral employer not to cross the picket lines in the course of their employment. The question presented is whether by such conduct the labor organization violated Section 8 (b) (4) (A) of the National Labor Relations Act, which makes it unlawful for a labor organization to induce or encourage employees to strike or to engage in a concerted refusal to perform services for their employer, where an object thereof is to force the employer to cease doing business with any other person. A

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[1] In addition to picketing in the vicinity of the plant of Kaplan, the employer involved in this dispute, the Union also picketed certain railroads in an effort to force them to cease transporting products to Kaplan and other rice mills. The court below, reversing the Board, held that by picketing the railroads the Union violated Sections 8 (b) (4) (A) and (B). The Board does not seek review of the holding of the court below on this point.

subsidiary question is whether, the labor organization involved not having been certified as exclusive bargaining agent, its conduct violated Section 8 (b) (4) (B) of the Act, which makes it unlawful for a labor organization to induce employees to engage in a strike or other concerted refusal to perform services for their employer where an object thereof is to require another employer to recognize or bargain with a labor organization which has not been certified under the provisions of Section 9.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 15-19.

STATEMENT

Upon charges filed by six Louisiana rice mills (R. 18, 24, 28, 30),[2] the Acting Regional Director of the Board for the Fifteenth Region issued a complaint (R. 36-43) against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 201, A.F.L. (hereafter called the "Union"). The complaint alleged, *inter alia*, that the Union, in violation of Sections 8 (b) (4) (A) and (B) of the Act, induced and encouraged "the employees of The Sales

[2] The charging parties, also the petitioners in the court below, consisted of the International Rice Milling Company, Inc., American Rice Milling Company, Inc., Louisiana State Rice Milling Company, Inc., Supreme Rice Mill, Loving Rice Mills, and Kaplan Rice Mills, Inc.

House to engage in a concerted refusal in the course of their employment to transport or otherwise handle . . . . commodities to or from the plant of Kaplan. . . ." (R. 42). The undisputed facts relating to this incident, as found by the Trial Examiner and adopted by the Board (R. 101, 112-114, 118-119, 122-125), may be summarized as follows:

After an organizational drive in November 1946, among the employees of the six rice mills, the Union requested each of the mills to recognise it as the exclusive bargaining representative. The mills asked the Union to prove its claim to majority representation, and, when the Union failed, they refused to recognise it (R. 112-114). Without obtaining Board certification, the Union, on September 3, 1947, instituted a strike to obtain recognition, which, by September 17, extended to all of the mills except Kaplan Rice Mills (R. 114). Picket lines, patrolled by between one and four strikers, were established at all of the struck mills (R. 114-115). The pickets carried placards each bearing one of the following legends and the name of the mill (R. 115):

> This is a picket line. Respect it. Do not cross it.
>
> This job is unfair to Local 201, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.
>
> This job unfair to organized labor.
>
> High cost low pay blues.

On October 15, 1947, the Union commenced to picket in the vicinity of the Kaplan mill, although no strike had been called there and none of the Kaplan employees were on strike (R. 118-119). The pickets carried various signs, one being "This job unfair" to the Union (R. 119, n. 10).

On October 21, 1947, a truck of the Sales and Service House, driven by two employees of that firm, appeared at the Kaplan mill to obtain some rice or bran for Sales House (R. 122). The Sales and Service House is engaged in the business of selling feed and grain, and it purchases and handles goods, articles and commodities from the Kaplan Rice Mills (R. 111-112). As the Sales House truck was about to enter the Kaplan mill, it was stopped by Union pickets who told the truck drivers that "you can't go" into the mill because "we got a strike on" (R. 122).

The Sales House drivers agreed "to go back," and they returned to the highway where they stopped and were met by a representative of the Kaplan mill (R. 122). Together with the Kaplan mill representative, the drivers returned to the mill by another route. As they crossed the railroad tracks in the immediate vicinity of the mill and proceeded to enter, rocks were thrown at the trucks by the Union pickets (R. 122-123). The drivers nevertheless proceeded on to the mill (R. 123).

On the basis of the foregoing facts, the Board, in its decision and order of June 20, 1948 (R. 100-103), concluded that the Union's conduct toward

the Sales House employees did not violate Section 8 (b)(4)(A) and (B), and accordingly dismissed the complaint in this respect. In reaching this conclusion, the Board applied the construction of Section 8(b)(4)(A) which it had adopted in *The Pure Oil Company* case, 84 NLRB 315 (R. 103, n. 2). In that case the Board, after careful consideration of the legislative history, held that Section 8 (b) (4)(A) was not intended to "outlaw any of the primary means which unions traditionally use to press their demands on employers." In the instant case, the Board stated (R. 102-103):

> The [Union's] activities arose out of the *primary* picketing of the *Kaplan* mill, and were carried out in the immediate vicinity of that mill. Violence does not convert *primary* picketing into *secondary* action within the meaning of Section 8 (b) (4) (A) or (B) [footnote omitted].[*]

The court below reversed, holding that the Union's conduct in inducing the Sales House employees to refuse to perform services for their employer at the Kaplan mill did constitute an un-

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[*] In addition to stating that it did not condone the violence on the picket line, the Board said (R. 103):

> As the complaint herein does *not* allege restraint and coercion of employees in violation of Section 8(b)(1)(A), we are not called upon to decide whether the Respondent's conduct toward the employees of the Sales House constituted a violation of that Section.

In other cases the Board has held that violence accompanying primary picketing is violative of Section 8 (b) (1) (A). *International Longshoremen's and Warehousemen's Union, CIO, et al.*, 79 NLRB 1487, 1504-1507; *United Furniture Workers of America, et al.*, 81 NLRB 886.

fair labor practice within the meaning of Sections 8 (b) (4) (A) and (B). The court stated (R. 159):

> The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. If the union's activities come within the language of the statute, they constitute an unfair labor practice, regardless of whether they might have been considered a true "secondary boycott" under the old common law or under any of the modern popular theories.

The court added (R. 159-160):

> The fact that [the Union's activities] occurred near the struck plant is not enough to draw such a distinction as the Board attempts to draw, especially where there is violence * * *. To allow the Board to rule such activity as prohibited by the statute not to be a violation thereof, simply because it occurred in the vicinity of the struck employer's plant, would render the section ineffective and insufficient.

Accordingly, the court set aside the Board's order dismissing the complaint and remanded the matter to the Board for further proceedings in conformity with the court's opinion.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that Sections 8 (b) (4) (A) and (B) of the Act do not permit the Board to dis-

tinguish between primary and secondary union activity.

2. In setting aside the Board's order insofar as it dismissed that portion of the complaint which alleged that the Union's inducement of the Sales House employees constituted unfair labor practices within the meaning of Sections 8 (b) (4) (A) and (B) of the Act.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that Section 8 (b) (4) (A) must be read literally, and that, so read, it comprehends primary as well as secondary union action insofar as it bears upon employees of a neutral employer, conflicts with the holding of the Court of Appeals for the District of Columbia Circuit in *Denver Building and Construction Trades Council, et al.* v. *National Labor Relations Board*, decided September 1, 1950, not yet officially reported, a conflict noted in the *Denver* opinion. In the *Denver* case the court, finding the legislative history controlling, held that Section 8 (b) (4) (A) must be "construed as condemning as an unfair labor practice a secondary boycott or strike but not primary action even when an object in a limited sense may be construed to be to force or require an employer to cease doing business with another" (slip op., p. 10) [1] "Not every strike which

[1] Since the violation alleged in the *Denver* case involved only Section 8 (b) (4) (A), the court's decision therein is, in terms, limited to that provision. However, the question of whether Section 8 (b) (4) (B) is limited to secondary activity

might be construed to have as an object the forcing of someone to 'cease doing business' with someone else is prohibited. * * * But cf. *contra, International Rice Mills* v. *Labor Board,* June 21, 1950 (5th Cir.)" (slip op., p. 8).

The Board holds that picketing at the premises of an employer with whom a union is engaged in a labor dispute is primary and does not violate Section 8 (b) (4) (A), even though an object of the picketing is to induce employees of neutral employers, who approach the picket line in the course of their employment, not to cross it.[8] On the other

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is governed by the identical considerations which determine this question in respect of Section 8 (b) (4) (A). Accordingly, the District of Columbia Circuit's premise concerning 8 (b) (4) (A) is equally applicable to 8 (b) (4) (B).

[8] *Oil Workers International Union, Local Union 346 (CIO) and The Pure Oil Company,* 84 NLRB 315; *United Electrical, Radio and Machine Workers of America, et al. and Ryan Construction Corporation,* 85 NLRB 417; *International Brotherhood of Teamsters, et al. and Schultz Refrigerated Service, Inc.,* 87 NLRB, No. 82.

Illustrative of Congress' intention to deal only with secondary boycotts in Section 8 (b) (4) (A) is the statement of Senator Taft (93 Cong. Rec. 4198) that:

> This provision [Section 8 (b) (4) (A)] makes it unlawful to resort to a *secondary boycott* to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees . . . under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to *secondary* boycotts. (Emphasis added.)

He added that "secondary boycotts" are to be distinguished from "strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes" (93 Cong. Rec. 3834). Similarly, in referring to Section 8 (b) (4) (B), the Committee reports specifically note: "It is to be observed that the primary strike for recognition (without a Board certification) was not prohibited." H. Conf. Rep.

hand, the Board holds that where picketing or other forms of inducement to cease work occur at the premises of a neutral employer, the union's conduct is secondary and therefore violative of Section 8 (b) (4) (A).[6] Where picketing occurs at a project where two or more employers, only one of whom is involved in a labor dispute, are at work, the Board holds that the picketing is secondary if the evidence shows that the picketing is designed to induce employees of one of the neutral employers to cease work for the purpose of disrupting business relations between the neutral employer and the employer who is engaged in the dispute.[7]

The *Denver* case agrees with the Board, not with the Fifth Circuit in the instant case, as to the existence of the primary-secondary distinction,

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No. 510, 80th Cong., 1st Sess., p. 43; S. Rep. No. 105, 80th Cong., 1st Sess., p. 22.

As the Court in the *Denver* case pointed out (slip op., p. 8), the fact that Congress did not intend, by Section 8 (b) (4) (A), to reach primary activity is further emphasized by Section 13 of the Act, which preserves the right to strike except as specifically provided otherwise.

[6] *United Brotherhood of Carpenters, et al. and Wadsworth Building Company, et al.*, 81 NLRB 802, 10 (l) injunction sustained, 170 F. 2d 863 (C.A. 10) enforced 26 LRRM 2480 (C. A. 10, August 14, 1950); *Printing Specialties and Paper Converters Union, Local 388, A.F.L. and Sealright Pacific, Ltd.*, 82 NLRB 271, 10 (l) injunction sustained, 171 F. 2d 331 (C.A. 9), certiorari dismissed, 336 U.S. 949. Cf. *Douds v. Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D. N.Y.).

[7] *Denver Building and Construction Trades Council, et al. and Gould and Preisner*, 82 NLRB 1195, enforcement denied, September 1, 1950 (C. A. D. C.); *International Brotherhood of Electrical Workers, et al. and Samuel Langer*, 82 NLRB 1028, enforced, 181 F. 2d 34 (C. A. 2); *Local 74, United Brotherhood of Carpenters and Joiners, et al. and Watson's Specialty Store*, 80 NLRB 533, enforced, 181 F. 2d 126 (C.A. 6).

but disagrees with the Board, as well as with the Second and Sixth Circuit cases cited immediately below, as to whether the particular conduct involved was to be regarded as primary or secondary. The *Denver* opinion thus enlarged the scope of the exemption for primary strikes and picketing recognized by the Board. It held, reversing the Board, that where picketing occurs at premises where an employer with whom the union is engaged in a dispute is at work the picketing must be regarded as primary and hence not in violation of Section 8(b) (4) (A), although employees of another employer are at work on the same project and the picketing is shown to have been designed to induce those employees to cease work for their employer, with an object of disrupting business relations between the employers.

In *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34 (C. A. 2), certiorari pending, No. 108, this Term, and *National Labor Relations Board* v. *Local 74, United Brotherhood of Carpenters and Joiners of America*, 181 F. 2d 126 (C. A. 6), certiorari pending, No. 85, this Term, the Courts of Appeals for the Second and Sixth Circuits, while sustaining the Board's view that picketing under these circumstances is secondary, and hence in violation of Section 8 (b) (4) (A), likewise assumed the validity of the Board's fundamental construction of Section 8 (b) (4) (B), which excludes primary picketing from the ban of that Section.

These cases are in conflict with the decision of the Court of Appeals for the District of Columbia Circuit only with respect to application of the primary-secondary distinction to common-project cases. The decision below, which rejects the Board's distinction between primary and secondary activities, *in toto*, accords to Section 8 (b) (4) (A) a broader scope than does the Board and the other courts of appeals which have had occasion to consider the question.

Because of the conflict between the views of the court below and the Court of Appeals for the District of Columbia Circuit as to the *validity* of the primary-secondary distinction, and the conflict between the Courts of Appeals for the Second and Sixth Circuits and the Court of Appeals for the District of Columbia Circuit as to *application* of the primary-secondary distinction, the Government believes that this Court should resolve both questions. In addition to the instant petition, we are therefore also filing a petition for a writ of certiorari in the *Denver* case, and withdrawing our oppositions to certiorari in the *Electrical Workers* and *Carpenters* cases, insofar as those petitions seek review of the question of application of the primary-secondary distinction to picketing at a project where two employers, only one of whom is involved in a labor dispute, are at work.

2. The question whether Sections 8 (b) (4) (A)

and (B) outlaw primary union activity is of major importance in the administration of the National Labor Relations Act. Between August 22, 1947, and June 30, 1950, a total of 960 charges have been filed with the Board alleging violations of these provisions. These charges accounted for well over 90 percent of the total volume under all of the subsections of Section 8 (b) (4).

During this period and since, the General Counsel of the Board, in deciding whether Section 10 (*l*) required him to petition the District Court for temporary injunctive relief in respect of 8 (b) (4) (A) and (B) charges, as well as in deciding whether to issue a complaint based thereon, has followed the practice of dismissing such charges where only primary union activity appeared to be involved. Moreover, the Board, in those cases which have reached it for decision, has uniformly given effect to the primary-secondary distinction. The court below, by rejecting the principle that Sections 8 (b) (4) (A) and (B) are limited to secondary union activity, has thus upset a policy which both the General Counsel and the Board have applied in a significant number of cases.

The Board believes that the distinction between primary and secondary activities is necessary to give effect to the policy which Congress sought to embody in Section 8 (b) (4) (A)—outlawing secondary boycotts while preserving the right to engage in primary strikes and picketing, and

dealing with abuses of that right in other provisions of the statute, like Section 8 (b) (1) (A). It is important to the Board as well as to labor organizations, employers and the public generally to know whether the Board's construction of the statute in this respect is correct.

CONCLUSION

The question raised by the decision below conflicts in fundamental principle with that of another Court of Appeals. This question is of substantial public importance. It is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DAVID P. FINDLING,
Associate General Counsel,
National Labor Relations Board.

SEPTEMBER, 1950.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151, *et seq.*), are as follows:

* * * * * *

UNFAIR LABOR PRACTICES

Sec. 8. (a) * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for em-

ployees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) * * *

* * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the

meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That

for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).